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EPA Proposes to Amend PBT Rules for decaBDE and PIP (3:1)

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On November 24, 2023, the U.S. Environmental Protection Agency (EPA) published a proposed rule that will amend the regulations for decabromodiphenyl ether (decaBDE) and phenol, isopropylated phosphate (3:1) (PIP (3:1)), two of the five persistent, bioaccumulative, and toxic (PBT) chemicals addressed in final rules issued under the Toxic Substances Control Act (TSCA) in January 2021. 88 Fed. Reg. 82287. In the proposed rule, EPA states that after receiving additional comments following the issuance of the 2021 PBT final rules, it "determined that revisions to the decaBDE and PIP (3:1) regulations are necessary to address implementation issues and to reduce further exposures." According to EPA, as required under TSCA, the proposed requirements would, if issued in final, reduce the potential for exposures to humans and the environment to decaBDE and PIP (3:1) to the extent practicable. EPA notes that it is not proposing to revise the existing regulations for the other three PBT chemicals (2,4,6-tris(tert-butyl)phenol (2,4,6-TTBP), hexachlorobutadiene (HCBD), and pentachlorothiophenol (PCTP)) at this time. Comments must be received on or before **January 8, 2024**.

Background

On January 6, 2021, EPA issued final rules under TSCA Section 6(h)

for five PBTs — 2,4,6-TTBP (86 Fed. Reg. 866); decaBDE (86 Fed. Reg. 880); HCBD (86 Fed. Reg. 922); PCTP (86 Fed. Reg. 911); and PIP (3:1) (86 Fed. Reg. 894). The final rules limit or prohibit the manufacture (including import), processing, and/or distribution in commerce for the following:

EPA announced on March 8, 2021, that "in accordance with Biden-Harris Administration executive orders and directives," it is asking for additional public input on these rules. EPA opened a 60-day comment period for the public to provide new input on:

In March 2022, EPA issued a final rule extending the compliance dates to **October 31, 2024**, for the prohibitions on PIP (3:1) when used in some articles. 87 Fed. Reg. 12875. On May 3, 2023, EPA announced its intent to extend the January 6, 2023, compliance date on the prohibition on the processing and distribution of decaBDE for use in wire and cable insulation in nuclear power generation facilities, and decaBDE-containing wire and cable insulation. EPA also issued a related temporary "Enforcement Statement," indicating that it does not intend to pursue violations of this prohibition on processing and distribution of decaBDE-containing wire and cable insulation for use in nuclear power generation facilities, "as long as the entities involved are diligently seeking to qualify their alternative products in accordance with

Nuclear Regulatory Commission (NRC) regulations and guidance."

DecaBDE

According to EPA's web page, "**Current and Future Actions on PBT Rules**," for decaBDE, EPA proposes to:

- [illegible]
- [illegible]
- [illegible]
- [illegible]
- [illegible]
- [illegible]

PIP (3:1)

For PIP (3:1), EPA proposes to:

- [illegible]
- [illegible]
- [illegible]
- [illegible]
- [illegible]
- [illegible]
- [illegible]
- [illegible]
- [illegible]

- _____

Commentary

EPA's proposal to modify the rules for decaBDE and PIP (3:1) adds protections to the previous rules and maintains some key practicability issues for which EPA received significant criticism.

Perhaps most critical is EPA's proposal to allow continued use of PIP (3:1) in wire harnesses and circuit boards for fire safety reasons. These uses of PIP (3:1) were largely responsible for the tumult in 2021 when importers and distributors of electronics discovered that EPA had promulgated a full ban on the presence of PIP (3:1) in articles. Our understanding is that PIP (3:1) might be in other parts, such as wire coatings (not part of wire harnesses or circuit boards); surprisingly the proposal does not acknowledge this ubiquitous condition of use for PIP (3:1).

For both substances, EPA is adding requirements to use PPE (gloves and respirators) while acknowledging that gloves and respirators are routinely worn. This yet again brings up the tension between EPA's assumption that PPE is not used, information reasonably available to EPA that PPE is used, and whether it is necessary for EPA to impose these requirements in a TSCA rule. EPA has more leverage in this rulemaking because Section 6(h) requires that EPA reduce exposures to the *extent practicable* — a separate threshold from the Section 5(e) and 6(a) requirements to control to the *extent necessary* to mitigate unreasonable risk (a term that will undoubtedly be litigated when EPA publishes its risk management rules under Section 6(a)). It is *practicable* to require PPE use regardless of whether it is *necessary* to require PPE use. EPA includes a proposal to define "regulated area" to be an area where "airborne concentrations or direct dermal contact" can "reasonably be expected;" PPE will be required in such an area. While this may seem sensible, it suffers from a lack of clarity as to what "airborne concentration" would count. If handling decaBDE-containing

pallets is being done outdoors, what distance would suffice such that the airborne concentration is not “reasonably expected?” The concentration will diminish with distance, but it will be impossible for an operator to determine with certainty the distance at which there is zero concentration and PPE is no longer required. From a practical standpoint, an operator might use a level of detection (LOD) as a surrogate for “reasonably expected,” but will EPA agree to that standard in an enforcement action?

We were surprised to see that EPA is requiring that employers keep records of the “name, workplace address, work shift, job classification, and work area of each person reasonably likely to directly handle [the PBT] or handle equipment or materials on which [the PBT] may be present and the type of PPE selected to be worn by each of these persons.” It is not clear what protective benefit EPA expects from records of this information over and above the recordkeeping of the policies, procedures, and training associated with the other existing workplace protection standards.

We are relieved that EPA does not propose to eliminate the restriction on processing and distribution of articles that may contain either decaBDE or PIP (3:1) that has previously been sold or supplied to an end user. We also agree that restrictions on disposal of articles that may contain either decaBDE or PIP (3:1) are not practicable. Users of articles that may contain either substance have no way to know if an electronic device or piece of furniture contains either substance. If, for example, consumer products older than a particular vintage were required to be disposed of as hazardous waste, the practical result is that such products would likely be illegally dumped because waste handling facilities would refuse to accept such products. Illegal dumping is already a disproportionate burden on communities near highway and train rights-of-way. Making it more difficult or expensive to dispose of everyday items will exacerbate illegal dumping if individuals disposing of such items cannot easily arrange for legal disposal.

We are disappointed that EPA does not propose a *de minimis* limit for either substance, and we are puzzled why EPA thinks that "there are any number of reasonable steps that can be taken to determine whether a product or article is compliant with the PBT regulations, such as contract specifications that describe the chemicals that may not be used, or a statement from the supplier that the articles furnished do not contain specific prohibited chemicals." Customers and suppliers can (and do) enter contracts specifying that a particular substance is not intentionally added and/or that a substance is not present above a certain threshold, but it would be irresponsible for a supplier to certify to the *complete absence* of a substance. A supplier cannot know with certainty that there is complete absence of a substance, and any representation otherwise would put the supplier in significant jeopardy if a product supplied was later found to contain a small, but non-zero, amount. Suppliers routinely certify to the substance not being intentionally added and will often certify that a substance is not present above a measurable threshold (such as the 1,000 ppm for brominated diphenyl ethers, the European Union (EU) Restriction of Hazardous Substances (RoHS) Directive standard). We urge readers to comment on the proposed rule to dispel EPA's view that suppliers will certify to the absence of either substance and request that EPA establish a *de minimis* threshold for both decaBDE and PIP (3:1).

We understand EPA's intent to propose labels for decaBDE-containing pallets but question the practicability of producing a legible label large enough to contain the entirety of the proposed text. One option is for the text to be much shorter. It might be sufficient to inform the reader that decaBDE is present and that requirements in 40 C.F.R. Section 751.405 must be followed. EPA recognized this limitation on smaller decaBDE-containing parts, such as replacement parts for vehicles.

A condition of use that seems to be inconsistently restricted is the import of recycled plastic that may contain decaBDE but to which decaBDE has not been intentionally added. The current rule (and EPA proposes not to modify this aspect of the rule) allows "[p]rocessing and

distribution in commerce for recycling of decaBDE-containing plastic from products or articles and decaBDE-containing products or articles made from such recycled plastic, where no new decaBDE is added during the recycling or production processes is not subject to the prohibition in paragraph (a) of this section." In its original rulemaking, EPA acknowledged that this may leave some decaBDE in commerce as such plastics are recycled, but balanced that against the result of a prohibition, which would essentially ban all plastic recycling because plastic recyclers could not ensure the absence of decaBDE in waste plastic. This exclusion from the prohibition does not extend to imported plastic in the current rule. As a result, imported plastic may not be used for recycling (unless a complete absence of decaBDE can be documented — again, an impossibility). Nevertheless, EPA's proposal for workplace protection includes an exclusion for the PPE requirements for both the processing of decaBDE plastics from products or articles and for "import of decaBDE and decaBDE-containing products and articles." This inconsistency leads us to question whether EPA intended to prohibit import of decaBDE-containing plastic for recycling and perhaps EPA would be open to modifying the prohibition on such import as part of this rulemaking.

In summary, EPA seems to have addressed the most problematic restrictions in the original rule (notably PIP (3:1)-containing articles), added some new restrictions (PPE requirements), and left some provisions (no *de minimis* level) the same. We urge stakeholders to review the proposed rule and comment before the deadline. EPA will be justifiably unforgiving if industry misses the comment opportunity this time around.

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